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No.____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

KENNETH T. LYONS and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
*Petitioners,*

*v.*

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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## QUESTIONS PRESENTED

1. Whether the Supreme Court of Rhode Island erred in holding, as a matter of constitutional law, that a report of allegations made and investigations in progress, literally accurate when first published, can never be found to be "false" in a defamation action, even when the report has been republished after the allegations have been discredited and the investigations terminated favorably to the plaintiffs.

2. Whether the Supreme Court of Rhode Island erred in interpreting this Court's decision in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), to require *de novo* review of the jury's credibility determinations and findings of historical fact in a defamation action.

## LIST OF PARTIES

The parties to this proceeding are listed in the caption. Petitioner National Association of Government Employees, Inc. (NAGE) is a Delaware nonprofit corporation. NAGE is affiliated with the Service Employees International Union, AFL-CIO.

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RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

The petitioners, Kenneth T. Lyons and the National Association of Government Employees, Inc., respectfully pray that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Rhode Island, entered in this action on May 11, 1989.

### OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 559 A.2d 130, and is reproduced in the Appendix to this Petition at A-1–A-14. A prior decision of the Supreme Court of Rhode Island, dated October 30, 1986, is reported at 516 A.2d 1339, and is reproduced in the Appendix at A-15–A-31.

## JURISDICTION

The judgment and opinion of the Supreme Court of Rhode Island were issued on May 11, 1989. This Court's jurisdiction to review the judgment of the Supreme Court of Rhode Island is provided by 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioners Kenneth T. Lyons and National Association of Government Employees, Inc. (NAGE) seek review of the Rhode Island Supreme Court's decision reversing a jury's verdict that respondents, Rhode Island Public Employees Council 94 (Council 94) and the American Federation of State, County, and Municipal

Employees (AFSCME), libeled the petitioners in the course of contested labor elections in Rhode Island in 1975. The jury's verdict reflected findings that petitioners had carried their burdens of proving that respondents had made false statements of fact and had acted with actual malice in repeating long-buried and unfounded allegations of wrongdoing against petitioners. The Rhode Island Supreme Court, purporting to apply this Court's First Amendment rulings in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), and *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), reversed not only the verdict but its own prior ruling in this very case, and held on the basis of its own "de novo" review of the evidence that the respondents' defamatory republications of discredited allegations of misconduct were entitled to constitutional protection as "truthful" speech.

### A. Background Facts

Petitioner Lyons is the founder and president of petitioner NAGE, a labor union representing federal, state, and local government employees. In 1972, Mr. Lyons and his union were briefly subjected to federal investigations into two separate sets of allegations of possible misconduct. The first of these inquiries was based on anonymous allegations of misuse of union funds, which led to a Labor Department audit of NAGE's finances.

The second investigation involved allegations that Mr. Lyons had been involved in the marketing of a detergent product manufactured by an allegedly Mafia-controlled business. In June 1972, Mr. Lyons appeared before a Senate subcommittee and testified that he had been approached by a businessman seeking his assistance in marketing the product, but had rejected the overture based on doubts about the product, and had had no knowledge of any Mafia involvement and no

contacts with any Mafia figures. Based on Mr. Lyons' denial of the testimony of a previous witness, the matter was referred to the Justice Department for an investigation into the possibility that perjury had been committed.

During the pendency of the Labor Department and Justice Department inquiries, syndicated newspaper columnist Jack Anderson wrote an article about the investigations, which was published in various newspapers on October 31, 1972. The article, entitled "The Investigation," referred to Mr. Lyons' prominence both as a labor leader and as a political figure, but was focused principally on the allegations of wrongdoing by Mr. Lyons. Thus, the article began by reporting that Mr. Lyons was "under double-barreled federal investigation," and continued:

> Both the Justice and Labor Depts. are looking into the doings of Kenneth T. Lyons, a tough and talkative union boss now serving as national vice-chairman of Democrats for Nixon. Justice is studying whether he committed perjury in a Mafia-related case, and Labor is investigating charges that he misused union funds.

The article went on to detail the allegations concerning Mr. Lyons, including the charges that he was involved in marketing a product "linked to an underworld family with a record for strong-arm business tactics," that he had met with the nephew of a former "mob 'godfather,' " and that he had been involved in some unspecified "misuse of union funds."

Less than two months after the appearance of Mr. Anderson's article, however, the charges that the article detailed had evaporated. The Labor Department's audit of NAGE revealed no misuse of union funds or other wrongdoing by Mr. Lyons, and the Justice Department found no evidence that would support a perjury prosecution of Mr. Lyons. The parties to the present action

have stipulated that both investigations were over by December 1972, and that neither investigation resulted at any time in any formal charges against Mr. Lyons or NAGE.

Three years later, however, in late 1975 and in the spring and summer of 1976, the stale charges and terminated investigations were resurrected by respondents AFSCME and Council 94, NAGE's opponents in contested elections to represent collective bargaining units of public employees in Rhode Island.[1] Representatives of AFSCME and Council 94, by their own admission, prepared thousands of copies of Jack Anderson's 1972 article about the investigations and distributed them to employees eligible to vote in the elections. Moreover, the evidence indicates that at least some of the reprints distributed by respondents' representatives had been modified through the addition of the headline "EXPOSE: Jack Anderson looks at NAGE" and through the underlining of passages including "perjury in a Mafia-related case," "charges that he misused union funds," "an underworld family with a record for strong-arm business tactics," "godfather," and "Lyons's alleged misuse of union funds."[2] None of the reprints distributed by respondents informed readers that the investigations had found no basis for the charges featured so prominently in the article.

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1. Council 94, a local affiliate of AFSCME, is the product of a merger of two predecessor organizations, Councils 22 and 70, which were separate entities at the time of the events described. For convenience, we shall simply use the term "Council 94" to refer both to respondent Rhode Island Public Employees Council 94 and to its predecessor organizations.

2. This version of the article was reproduced as an appendix to the Rhode Island Supreme Court's first opinion in this case. *See* 516 A.2d at 1346. It is reprinted in the Appendix to this Petition in accordance with the typeface requirements of Rule 33 of this Court. Portions underscored in the original are reprinted in bold. Pet. App. A-29–A-31.

Respondents' republication of the Anderson article was not the result of ignorance concerning the disposition of the charges against Lyons. Evidence in the record indicates that AFSCME officials followed the course of the investigations of Mr. Lyons closely; that one of respondents' representatives involved in the distribution of the reprints had been an NAGE employee in 1972 and was aware that the investigations had terminated favorably to Mr. Lyons and NAGE; and that, when confronted with the facts by an NAGE organizer, agents of respondents who were distributing the article replied: "We know it's a lie, but the employees don't know it."[3] Moreover, it is undisputed that reprints of the Anderson article were distributed by respondents' representatives even after counsel for NAGE had twice written to AFSCME's national headquarters complaining of such activities and informing AFSCME that NAGE considered such republication libelous in view of the favorable termination of the investigations three years earlier.[4]

**B. Proceedings Below**

Petitioners Lyons and NAGE filed this action against respondents Council 94 and AFSCME[5] in the Superior Court of Rhode Island, alleging that the reprints of the Anderson article were false and defamatory at the time they were republished by respondents, and that respondents had libeled petitioners by republishing

3. This evidence is disputed by respondents.

4. The attorneys who put respondents on notice were at the same time acting as counsel for petitioners in a case in the United States District Court for the District of Columbia, in which the court had already determined that republication of the Anderson article could be found to be false in view of the termination of the investigations. *See infra,* at p. 15.

5. A third defendant, AFSCME Local 911, was also named in the complaint. However, Local 911 is not a party in this Court, as it was not a party to the most recent appeal to the Rhode Island Supreme Court.

the reprints with actual malice — that is, with knowledge that the reprints were false or with reckless disregard of their truth or falsity. Petitioners stipulated that they were "public figures" required to show actual malice in order to recover under *New York Times v. Sullivan*, 376 U.S. 254 (1964).

When the case was initially tried in June 1983, the jury returned a verdict in favor of the respondents. Petitioners Lyons and NAGE moved for a new trial on the ground that the verdict was contrary to the law and the weight of the evidence. While the motion was pending, the justice who had presided over the trial died, and a new justice was appointed to rule on the new trial motion. The replacement justice denied the motion on the ground that the republication of the article was truthful, since the investigations discussed in the article had in fact been ongoing when the article was originally written, and since the respondents had republished the article verbatim (albeit with some embellishments).

The Rhode Island Supreme Court reversed the denial of the new trial motion. Rejecting the trial justice's conclusion that the republication of the article was truthful three years after the investigations it described had ended, the court described the article as "somewhat less than accurate at the time of its republication," and held that "in determining whether the republications in this case were false and defamatory, the decisive question is what the persons to whom they were disseminated in 1975 and 1976 reasonably understood as the meaning intended to be expressed by the disseminators." Pet. App. A-27. Moreover, the court specifically found that there was evidence in the case that would have warranted jury findings not only of falsity, but of actual malice as well. Since the role of the trial justice in ruling on a new trial motion included assessing the credibility of such evidence, and since the replacement

justice had not heard the testimony whose credibility was to be assessed, the court ruled that a new trial must be granted.

The case was retried in December of 1987. The jury returned verdicts in favor of petitioners Lyons and NAGE against respondents Local 94 and AFSCME, and awarded actual and punitive damages totalling $1,275,000. The trial court denied respondents' motions for a new trial or for a directed verdict, and respondents appealed to the Supreme Court of Rhode Island.

On appeal, respondents contended, *inter alia,* that petitioners had failed to prove falsity and to demonstrate actual malice by clear and convincing evidence, as required by the First Amendment as construed in *Tavoulareas v. Piro,* 817 F.2d 762, 783 (D.C. Cir.), *cert. denied,* 108 S. Ct. 200 (1987) (falsity), and *New York Times v. Sullivan, supra* (actual malice). Respondents invoked the First Amendment requirement of searching appellate review with respect to the issue of actual malice established in *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984), and invited *de novo* review of the sufficiency of petitioners' showing of falsity and actual malice. Petitioners, while contesting neither their constitutional obligation of demonstrating falsity and actual malice nor the general applicability of *Bose,* urged the court to adhere to its earlier recognition that a jury could find that respondents' republication of discredited allegations and accounts of terminated investigations was false. Moreover, petitioners argued that the testimony and other evidence showing respondents' awareness that the investigations had terminated favorably to petitioners were sufficient, if credited, to demonstrate actual malice clearly and convincingly, and that the court should respect the jury's apparent choice to credit the testimony of petitioners' witnesses.

The Rhode Island Supreme Court reversed. Relying on this Court's ruling in *Bose Corp. v. Consumers Union, supra,* the Court purported to conduct "de novo review"

of the question whether the record "independently support[ed]" the conclusion that petitioners had carried their burdens of proving falsity and actual malice under *Philadelphia Newspapers v. Hepps, supra,* and *New York Times v. Sullivan, supra.* Pet. App. A-9–A-10. Adopting the very rationale it had rejected on the previous appeal, the court concluded the article reprinted by respondents was not false at the time it was republished, simply because it was not false when originally published. The court stated:

> We have previously observed that the facts as reported by Jack Anderson were true when the article was first published on October 31, 1972. *Lyons,* 516 A.2d at 1344–45. Kenneth Lyons was under investigation for alleged perjury by the Justice Department. The Labor Department was also "looking into" misuse of union funds by Lyons and NAGE.

Pet. App. A-10. The court also noted that the reprints distributed by respondents all bore the date October 31, 1972, and were further "dated" by their references to then-President Nixon and the upcoming 1972 election. Evidently concluding that the message conveyed by respondents' republication of the articles three years later was nothing more than the dry report that certain allegations had been made and certain investigations were underway in 1972, the court held that "the jury is prevented from concluding that the article was false and defamatory." Pet. App. A-11.

Despite its dispositive ruling on the issue of falsity, the court proceeded to address the issue of actual malice as well. Not surprisingly given its conclusion that the republication of the article was not false, the court concluded that petitioners had not carried their constitutionally mandated burden of demonstrating by clear and convincing evidence that respondents had reprinted the article with actual malice – that is, with knowledge that it was false or with reckless disregard for its truth or

falsity. The court's holding with respect to actual malice was based virtually exclusively on the testimony of respondents' representatives that they had relied on Jack Anderson's "credibility . . . as a syndicated columnist." Pet. App. A-12. The court rejected the testimony presented by the petitioners that demonstrated that one of respondents' representatives involved in handing out the reprints was a former NAGE employee who knew that the investigations had terminated favorably to petitioners. The court noted that this testimony had been controverted, and stated that "*[t]herefore,* we find that no clear and convincing evidence exists to establish that defendants distributed the reprints with knowledge of or reckless disregard for their falsity" (emphasis added). Pet. App. A-13. The court's opinion did not even address the testimony that two of respondents' representatives who had distributed the materials acknowledged that "[w]e know it's a lie" — testimony that the same court, in the previous appeal, had specifically relied on as support for its holding that there was enough evidence of actual malice to send the issue to the jury.

## REASONS FOR ALLOWANCE OF THE WRIT

### I.

### THE RHODE ISLAND SUPREME COURT'S RULING EXTENDS CONSTITUTIONAL PROTECTION TO FALSE STATEMENTS IN VIOLATION OF FUNDAMENTAL PRINCIPLES OF LIBEL LAW AND IN CONFLICT WITH RULINGS OF OTHER APPELLATE COURTS

The jury could permisibly have found the respondents' republication of the Anderson article false in either or both of two respects: first, the article was false simply in that it repeated false allegations of wrongdoing by petitioners; second, the article was false as of 1975 in

that its republication, in the context in which it occurred, would be understood by its readers as a statement that the investigations were still ongoing or had failed to clear petitioners. In rejecting both these theories of falsity as a matter of constitutional law, the Supreme Court of Rhode Island has worked a fundamental distortion of libel law. Taking as its starting point this Court's recognition that the First Amendment precludes imposition of liability for truthful speech in defamation cases, *see, e.g., Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. at 777, the Rhode Island court has in this case given birth to a startling and disquieting new First Amendment "right." Under the court's analysis, anyone may republish an account of long-discredited, false and defamatory allegations about another person and then claim full First Amendment protection on the theory that the republication is literally truthful in that the allegations, whether true or not, were at one time made. This result is contrary to firmly established principles of defamation law and to the rulings of numerous state and federal trial and appellate courts, and is in no way commanded by this Court's First Amendment rulings.

It has long been a fundamental principle of libel law that one may not report that charges or accusations of wrongdoing were made by another and then claim the justification of truth merely because those charges were in fact asserted: only if the underlying charges were in fact true is the person who repeats them protected. As the reporters of the *Restatement (2d) of Torts* have explained the rule:

> It is necessary to find that the defamatory matter contained in the statement is true. When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made

> by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established.

*Restatement (2d) of Torts,* § 581A, comment e; *accord, e.g., Medico v. Time, Inc.,* 643 F.2d 134, 137 (3d Cir. 1980), *cert. denied,* 454 U.S. 836 (1981); *McCall v. Courier-Journal,* 623 S.W.2d 882, 884–85 (Ky. 1981), *cert. denied,* 456 U.S. 975 (1982); *Jones v. Taibbi,* 400 Mass. 786, 512 N.E.2d 260, 265–66 (1987); *Chang v. Michiana Telecasting Corp.,* 14 Media L. Rep. 1889 (N.D. Ind. 1987).[6]

To protect the public's interest in obtaining information about public affairs, the common law (and perhaps the Constitution as well), provides a privilege to republish fair and accurate reports of allegations and accusations, even if false, made in the course of judicial proceedings, government investigations, and, in some jurisdictions, other events of public interest. *See, e.g., Medico v. Time, Inc., supra,* 643 F.2d at 137–38; *Brown & Williamson Tobacco Corp. v. Jacobson,* 713 F.2d 262, 270–71 (7th Cir. 1983); *Edwards v. National Audubon Society, Inc.,* 556 F.2d 113 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977).[7] But this privilege protects only *fair*

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6. This understanding of the concept of "truth" explains why the defendant in *Harte-Hanks Communications, Inc. v. Connaughton,* No. 88-10 (U.S. June 22, 1989), was not entitled to the defense of truth. Although the defendant had published an article that accurately reported that allegations of wrongdoing had been made against a candidate for local office, the defendant was held liable because of its awareness and reckless disregard of the probable falsity of the allegations themselves. *See id.,* slip op. at 27–35; *see also id.* (Blackmun, J., concurring). Under the analysis of the Supreme Court of Rhode Island, the defendants presumably would have been entitled to a constitutional defense of literal truth.

7. *But cf. Dickey v. CBS, Inc.,* 583 F.2d 1221, 1225–26 (3d Cir. 1978) (rejecting *Edwards'* recognition of a constitutional privilege to republish newsworthy allegations).

reports; it does not protect one who publishes a misleading, incomplete, unbalanced, or inaccurate account of the proceedings and allegations in question. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1132–33 (7th Cir. 1987), *cert. denied,* 108 S.Ct. 1302 (1988); *Connaughton v. Harte Hanks Communications, Inc.,* 842 F.2d 825, 847 (6th Cir. 1988), *aff'd on other grounds,* No. 88-10 (U.S. June 22, 1989); *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 69–70 (2d Cir. 1980).

Under these principles, the publication of Mr. Anderson's article in October 1972 may well have been privileged because it accurately portrayed the state of the investigations and the status of the charges at that time, despite the fact that the allegations of Mafia involvement, perjury, and misuse of funds it repeated were false. But because of its repetition of false allegations against petitioners, the article was not fully entitled to the claim of "truth" even in 1972; and the republication of the same article three years later, with no report of the facts that the investigations had terminated and the charges had been resolved in petitioner's favor, could no longer qualify even as a protected fair report. *See, e.g., Martin-Trigona v. Kupcinet,* 15 Media L. Rep. (BNA) 2369 (N.D. Ill. 1988) (report of plaintiff's conviction of a crime not entitled to fair report privilege where reversal on appeal not reported).

The Rhode Island Supreme Court's decision upsets this balance struck by the common-law concepts of truth and privilege by expanding the constitutionally protected category of truthful speech to include all literally accurate but incomplete accounts of any portion of proceedings involving the making of false and defamatory charges. The doctrine announced by the court would render the common-law "fair report" privilege completely superfluous: so long as a speaker stayed within the realm of half truth, he would have complete

constitutional immunity to spread *unfair* reports of stale and discredited allegations and investigations.

The Supreme Court of Rhode Island was equally wide of the mark in holding that the jury could not permissibly find that respondents' republication of the Anderson article was reasonably understood by its intended audience as a statement that the investigations referred to in the article were ongoing or had failed to clear petitioners. The court's substitution of its own view of this question for that of the jury was evidently based in part on the erroneous belief that its obligation of "de novo" review under *Bose Corp. v. Consumers Union, supra,* extended to the issue of falsity. *But see Levin v. CMP Publications, Inc.,* 738 F.2d 660 (5th Cir. 1984) (applying *Bose* review to issue of actual malice but not to falsity), *reh'g denied,* 753 F.2d 1341 (5th Cir. 1985); *Bartimo v. Horsemen's Benevolent & Protective Ass'n,* 771 F.2d 894, 897 (5th Cir. 1985), *cert. denied,* 475 U.S. 1119 (1986). The court also premised its holding on a narrow, literalistic conception of falsity that ignored the obvious fact that the very point of communicating this material in a labor election — the reason it was, in the words of respondents' witnesses, "relevant" — was that it conveyed the information that petitioners should be regarded as persons under suspicion.[8] The court's ruling in this respect is directly at odds with an earlier ruling of

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8. Evidence that this was the objective message of the reprint includes: the reprints' use of the present-tense headline "Jack Anderson *looks* at NAGE" (emphasis added); evidence that other handouts were distributed with the article stating that "Jack Anderson the syndicated columnist has written several articles on corruption and misrepresentation of facts concerning NAGE"; and evidence that a "fact sheet" distributed by respondents at the same time also referred to the investigations in the present tense. The latter materials, although not independently alleged to be libelous, were admitted as evidence of the circumstances surrounding the republication of the article, and they clearly support the finding that respondents' audience would have understood the reprints to represent the current state of affairs.

the United States District Court for the District of Columbia, which held that distribution of portions of the very same article could be found to constitute an actionable false statement of fact, because "[r]eading the republication as a whole, . . . a reasonable juror might conclude that the investigations were ongoing on March 5, 1974," when they had in fact been concluded over a year before. *Lyons v. Policemen's Association of the District of Columbia, Inc.*, Civil Action No. 74-441, slip op. at 3 (D.D.C. Feb. 20. 1976) (Jones, C.J.).[9]

Courts in other jurisdictions have divided over whether the concept of truth must be applied so narrowly as to give protection to publications that report on false charges made in the past without reporting on the subsequent vindication of the subject of those charges. In *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), *modified on other grounds*, 788 F.2d 1300 (8th Cir.) *(en banc), cert. denied*, 479 U.S. 883 (1986), the Eighth Circuit, relying on reasoning similar to that employed by the Rhode Island Supreme Court in this case, held that the defendant's statement that the plaintiff had been charged with rape several years before was not libelous by virtue of its failure to discuss the abundant evidence that the plaintiff had not committed the crime. Relying in part on First Amendment considerations, the court held that "the law does not recognize libel by omission as a tort." 759 F.2d at 648.[10]

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9. The article as republished in the *Policemen's Association* case omitted the portions indicating that Mr. Lyons denied the charges. However, under the analysis of the Supreme Court of Rhode Island, such omissions would not have diminished the reprint's protected status, as the remainder would still have been literally "true." A copy of the District Court's opinion in the *Policemen's Association* case has been lodged with the Clerk's Office.

10. Even the *Janklow* court, however, did not go as far as the Supreme Court of Rhode Island in this case, for the article at issue in *Janklow* in fact reported that federal prosecutors had found insufficient evidence for a rape prosecution. *Id.* at 646–47.

Numerous other courts, however, have rejected the notion that a speaker is free to dredge up the fact that false charges were made about another in the past without also reporting that the charges were subsequently determined to be unfounded. Thus, in *Antwerp Diamond Exchange of America v. Better Business Bureau of Maricopa County, Inc.*, 130 Ariz. 523, 637 P.2d 733 (1981), the Supreme Court of Arizona found that the defendants' report that the plaintiffs had been charged with fraud was rendered false and defamatory by its failure to include a full discussion of a court decision that had absolved the plaintiffs of the charges. Similarly, in *Express Publishing Co. v. Gonzalez*, 350 S.W.2d 589 (Tex. Civ. App. 1961), the court held that a newspaper's report of allegations of fraud made in a civil complaint was false and defamatory because it omitted the information that one of the defendants in the fraud action (the plaintiff in the libel case) had been dismissed from the fraud case.[11] *See also DiLorenzo v. New York News, Inc.*, 81 A.D.2d 844 (1981) (report that plaintiff "was convicted of perjury charges several years ago, which were subsequently dropped" was false and defamatory in that it omitted that the plaintiff had been retried and acquitted on some of the charges); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963) (radio report of plaintiff's conviction in summary trial before magistrate was rendered false and defamatory through omission of plaintiff's denial of charges and his exercise of right to de novo trial on appeal).

Most directly contrary to the conclusion of the Rhode Island Supreme Court are two recent appellate

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11. More recently, *Express Publishing* was relied upon by the United States District Court for the Southern District of Texas in *Torres v. Playboy Enterprises*, 7 Media. L. Rep. 1182 (S.D. Tex. 1980), in holding that a report that the plaintiff had been convicted of a crime was rendered false and defamatory by the omission of the information that the conviction had been reversed on appeal.

decisions from New Jersey, *Reilly v. Gillen,* 176 N.J. Super. 321, 423 A.2d 311 (App. Div. 1980), and *Barasch v. Soho Weekly News, Inc.,* 208 N.J. Super. 163, 505 A.2d 166 (App. Div. 1986). In *Reilly,* the defendant, on the eve of an election contest with the plaintiff, distributed copies of a 23-year-old newspaper article concerning a lawsuit that had been filed against the plaintiff in 1954 charging him with conspiracy and corruption. The defendant failed to reveal that, subsequent to the date of the article, the plaintiff had been fully exonerated. Despite the fact that, read literally, the article republished by the defendant did no more than summarize the facts as they had existed in 1954, the court held that the jury was entitled to find the republication false and defamatory. Rejecting the defendant's "once true, always true" syllogism, the court found that the republication of the article was neither truthful nor privileged as a fair report:

> In 1977 the 23-year-old article was not "fair and accurate" because of [the defendant's] failure to report the ultimate disposition of the charge. As republished, the article's unmistakable import was that plaintiff was guilty of wrongdoing, an insinuation which lay beyond the privilege whether we call it a false statement or a distorted account.
>
> . . .
>
> The trial judge correctly perceived that a report which is true when made may be defamatory if repeated under circumstances different from those surrounding the original publication . . . .

423 A.2d at 315.

In *Barasch,* the same court addressed a libel action based upon a newspaper's publication, in 1981, of an account of allegations made against the plaintiff, a labor leader, in a report of hearings held by a Senate subcommittee in 1966. The court again addressed and rejected

the argument that the report was protected as "truthful" because it accurately reported the charges made fifteen years earlier:

> It is one thing to report upon the current actions of a public body; it is quite another to report on a past action in order to provide background data concerning an individual. . . . If a plaintiff was charged with the commission of a crime but was never prosecuted and years later the plaintiff in some completely unrelated matter comes before the public, may the media describing his involvement in the new matter relate the details of the old charge? Where there is exoneration, of course they may not. . . . Where the charge had never been adjudicated or, as here, where the charge never ripened into a formal accusation that could have been adjudicated, must a citizen forever bear the stigma of having been "charged?" Years later, must a citizen shun all publicity for fear of revelation of the unsubstantiated "charge?" We think not.

505 A.2d at 175–76.

These divergent results reflect a broader confusion among the courts about the implications of this Court's constitutional rulings establishing "falsity" as a *sine qua non* of recovery in a defamation action and requiring plaintiffs to bear the burden of proof on the issue. In this case, the jury was properly instructed that the plaintiff was required to prove falsity, and its verdict clearly reflects a determination that the defamatory "sting" of the article was either that petitioners were still under investigation, or that they were in fact guilty of wrongdoing – both of which were demonstrably false. Nonetheless, the Rhode Island Supreme Court felt constitutionally compelled to reverse the jury's verdict on the ground that nothing respondents had directly said was in the most narrow and literal sense false. In so ruling, the court followed the lead of other courts that have held

that under *New York Times v. Sullivan* and its progeny, the literal truth of individual statements made by the defendant is a complete defense to a claim of libel, whatever the statements may imply when read together in the context in which they were made. *See Schaefer v. Lynch,* 406 So.2d 185 (La. 1981); *Mihalik v. Duprey,* 11 Mass. App. 602, 417 N.E.2d 1238 (1981); *cf. Strada v. Connecticut Newspapers, Inc.,* 477 A.2d 1005, 1011 & n.12 (Conn. 1984) (rejecting implication of defamatory falsehood from individually truthful statements of fact, but noting that false implication may arise from failure to print all relevant facts). Other courts, by contrast, have recognized that the literal truth of individual statements narrowly construed will not preclude a finding of falsity where, by omission or otherwise, the defendant has conveyed a false message to his intended audience. *See Memphis Publishing Co. v. Nichols,* 569 S.W.2d 412, 420 (Tenn. 1978); *Dunlap v. Philadelphia Newspapers, Inc.,* 448 A.2d 6, 14–16 (Pa. Super. 1982) ("the literal accuracy of separate statements will not render a communication 'true' where, as here, the implication of the communication as a whole was false"); *Berkos v. National Broadcasting Co.,* 161 Ill. App. 3d 476, 515 N.E.2d 668 (1987), *app. denied,* 522 N.E.2d 1241 (Ill. 1988); *Adams v. Daily Telegraph Printing Co.,* 292 S.C. 273, 356 S.E.2d 118 (Ct. App. 1986), *aff'd,* 295 S.C. 218, 367 S.E.2d 702 (1988); *Locricchio v. Evening News Association,* 16 Media L. Rep. (BNA) 1473 (Mich. App. 1989).[12]

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12. The uncertain meaning of "falsity" for purposes of determining whether allegedly defamatory speech is protected by the First Amendment is illustrated by the Rhode Island Supreme Court's own recent decision in *Healey v. New England Newspapers, Inc.,* 555 A.2d 321 (1989), *pet. for cert. pending,* No. 88-1939 (filed June 1, 1989), decided only two months before this case. In *Healey,* the court acknowledged that no directly false statements had been published by the defendant newspaper, but found that the newspaper's accurate publication of a statement of opinion by a third party,

In rejecting the jury's finding that the republication of an outdated and incomplete report of the existence and investigation of unfounded charges was false, the Rhode Island Supreme Court granted constitutional protection to speech that serves no First Amendment values. A one-sided resuscitation of dormant, false allegations of wrongdoing, even if carried out through the device of half-truth rather than direct misstatement, does not advance the ends of public debate, but can serve only to mislead. The Rhode Island court's decision to afford such speech constitutionally protected status directly conflicts with the rulings of other state appellate courts, reflects a broader division among the courts as to whether truth is to be measured only by the narrowest literal construction possible or by the jury's reasonable understanding of the meaning conveyed by a publication, and presents an important question of constitutional law that has not been, but should be, settled by this Court.

## II.

## THE RHODE ISLAND SUPREME COURT HAS MICONSTRUED THE SCOPE OF APPELLATE REVIEW OF JURY DETERMINATIONS OF ACTUAL MALICE REQUIRED BY THE FIRST AMENDMENT

The decision of the Supreme Court of Rhode Island reflects not only an overly broad notion of the realm of "truthful" speech subject to First Amendment protection, but also a fundamental misconception of the role of

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NOTES *(Continued)*

combined with its failure to print certain facts of which its reporter was personally aware, created a false implication. The court observed that "[t]he 'defamation' at issue here really consists of what was left unprinted as well as what was actually printed." 555 A.2d at 326. Based on the same court's subsequent constitutional analysis in the present case, of course, the *Healey* jury should have been "prevented" from finding in the article anything more than what it literally said.

an appellate court in reviewing determinations of "actual malice" under *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984).

To a great extent, the Rhode Island Supreme Court's ruling on actual malice stands or falls with its ruling on falsity, since the evidence on which the court based its ruling — namely, the testimony of respondents' witnesses that they relied in good faith on Jack Anderson's journalistic skills when they republished his article — speaks only to the question whether the respondents believed the article was accurate when it was originally written in 1972. Since, as explained above, the Rhode Island court was in error in believing that the accuracy of the article as of 1972 was the dispositive issue, it follows that an actual malice determination that focuses primarily on respondents' beliefs with respect only to the article's accuracy when written is similarly misguided.

However, as part of the "de novo" review of the evidence that it believed was called for by *Bose,* the Supreme Court of Rhode Island did also briefly purport to address the evidence as to whether respondents knew that the investigations had ended favorably to petitioners at the time they reprinted Mr. Anderson's article. Dismissing the testimony of one of petitioners' witnesses that a former NAGE employee who knew the outcome of the investigations was involved in distributing the article on behalf of the respondents, the court noted that this testimony was controverted, and held that petitioners had "therefore" failed to present clear and convincing evidence of knowledge of falsity. Moreover, the court completely failed to address the testimony of petitioners' witness that respondents' agents had acknowledged to him that the article was a "lie." Indeed, the court's general approach to its task of appellate review was simply to identify evidence that cut against the finding of actual malice, rather than assessing the sufficency of the evidence that, if believed by the jury, would have supported that finding.

The Rhode Island Supreme Court's evident conclusion that controverted oral testimony cannot constitute clear and convincing evidence of malice, combined with its apparent decision to ignore other testimony suggesting the existence of actual malice,[13] reflects an understanding of the function of appellate review under *Bose* that is directly at odds with this Court's recent ruling in *Harte-Hanks Communications, Inc. v. Connaughton,* No. 88-10 (U.S. June 22, 1989). In *Connaughton,* the Court emphasized that *Bose* does *not* subject jury determinations as to the credibility of conflicting oral testimony to *de novo* review. *See id.,* slip op. at 30. Rather, *Connaughton* makes clear that deference to the jury's findings of historical fact is the rule in defamation cases no less than in other litigation. *See id.,* slip op. at 32; *see also id.* (White, J., concurring); *id.* (Kennedy, J., concurring); *id.* (Scalia, J., concurring).[14]

In this case, there was testimony, which the jury was entitled to credit, that the agents who distributed the Anderson article for respondents were not only aware that petitioners had been cleared of the charges discussed in the article, but had openly acknowledged that awareness. There was additional evidence that respondent AFSCME had followed the charges against petitioners with close attention[15] and that the Anderson

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13. In their brief to the Rhode Island Supreme Court, respondents encouraged this approach by devoting considerable space to arguing the credibility of this testimony.

14. As noted above, *see* p. 14, *supra,* the court's error in applying *Bose* also affected its analysis of the issue of falsity.

15. Petitioners introduced evidence indicating that agents of respondent AFSCME prepared a "fact sheet" on petitioners in November 1972, which referred to the Anderson article and the Justice and Labor Department investigations and accused petitioner Lyons of "consort[ing] with underworld figures and members of the Mafia." In a letter disseminating these materials to an AFSCME organizer, an AFSCME official promised to "keep this updated regularly." Although respondents' witness Donald Wasserman, AFSCME's director of research, denied having seen these

article was distributed even after NAGE's lawyers informed AFSCME that such distribution constituted libel. Given this evidence, there is no basis for rejecting the jury's evident factual conclusion that respondents distributed the Anderson article knowing that the investigations it described had cleared petitioners three years earlier. Since, under a proper understanding of "falsity," such knowledge would constitute knowledge that the republication of the article was false, it follows that the jury's factual findings provide sufficient support for the conclusion of actual malice to survive the independent appellate review required under *Bose* and *Connaughton*. Certiorari should accordingly be granted to correct the lower court's misapplication of *Bose* as well as to address the important issues concerning the meaning of falsity presented by this case.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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materials until the first trial, the transmission letter for the "fact sheet" reported that Mr. Wasserman was responsible for directing that they be circulated. In view of this contradiction, the jury could rationally discredit Mr. Wasserman's denial that he was aware of the status of the investigations of petitioners.

# APPENDIX

KENNETH T. LYONS ET AL. :

v. :

No. 88-214-Appeal

RHODE ISLAND PUBLIC :
EMPLOYEES COUNCIL 94 ET AL. :

Supreme Court of Rhode Island

May 11, 1989

## OPINION

FAY, C.J. This Superior Court action for libel returns to us following a remand to the Superior Court for a new trial.[1] In the second trial, the jury returned a verdict for the plaintiffs. The defendants now appeal from the denial of their motions for a new trial or, in the alternative, for a remittitur. Additionally, the plaintiffs' cross-appeal alleging that the trial justice committed error in denying their motion to file a third amended complaint.

The plaintiffs, National Association of Government Employees, Inc. (NAGE), and its president, Kenneth T. Lyons (Lyons), brought this libel action after defendants, American Federation of State, County, and Municipal Employees (AFSCME), Rhode Island Public Employees Council 94 (council 94), and local No. 911, allegedly distributed reprints of a 1972 Jack Anderson syndicated column. Specifically the action was filed

1. In the first trial the jury returned a verdict for the defendants. The trial justice, however, died prior to hearing the plaintiffs' motion for a directed verdict. Thereafter a successor justice was appointed pursuant to Rule 63 of the Superior Court Rules of Civil Procedure. The second trial justice heard and denied the plaintiffs' motion for a new trial. Following the plaintiffs' appeal to this court of the trial justice's ruling, we allowed the motion and vacated the trial court judgment. *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339 (R.I. 1986).

against the president and the secretary/treasurer of AFSCME, council 94, and the president and the secretary/treasurer of local No. 911. Council 94 is the council for the State of Rhode Island Public Employees affiliated with AFSCME, and local No. 911, an AFSCME affiliate, represents the Newport city employees. The distribution of the article, according to plaintiffs, occurred during labor-election campaigns in 1975–76 between AFSCME and NAGE for the right to be the collective-bargaining agent for employees at the Rhode Island Medical Center, the University of Rhode Island (URI), and the city of Newport.

The Anderson column was originally published on October 31, 1972, and entitled "The Investigation." The article focused on the 1972 presidential election between Richard Nixon and George McGovern. Anticipating McGovern's defeat, the column noted that Democratic hopefuls would be vying for important positions "in the 1976 Presidential sweepstakes."

Specifically the article discussed NAGE's president, Kenneth T. Lyons, and indicated that he was under "double-barreled federal investigation" by the Department of Justice for alleged perjury in a Mafia-related case and by the Department of Labor for alleged misuse of union funds. The column highlighted the relationship between Lyons and Nixon and stated that the President had appointed Lyons to the prestigious White House advisory council. The column also described Lyons as "one of President Nixon's favorite labor leaders" and "an officer of Democrats for Nixon."

The column indicated that Lyons's trouble with the Justice Department began with alleged ties to a detergent product "linked to an underworld family with a record for strong-arm business tactics." According to the column, testimony before a Senate committee established that Lyons had agreed to distribute the detergent. Following this testimony, Lyons demanded to testify

before the committee. Lyons, appearing without counsel, denied all the allegations. The article continued stating that the Senate record was replete with contradictions and led to the Justice Department's investigation for perjury. Finally the column noted that the charge of misuse of union funds by the Labor Department evolved from a complaint initiated by union dissidents.

Two reprints of the Anderson article were allegedly disseminated by defendants in 1975 and 1976. The first reprint was an exact photocopy of the article with "New York Post, October 31, 1972," printed in the top right-hand corner of the page. These words were added above the line in a different print from that in the article. In the second reprint a black line surrounded the entire column, the words "EXPOSE, Jack Anderson Looks at NAGE" were placed in a bold, black headline, and several phrases were underscored in black. Underlined phrases included "Lyons's alleged misuse of union funds" and "one of their lunch and dinner companions * * * was Tony Camerota * * * 'godfather.'" We shall refer to the photostat reprint of the column as the Anderson reprint and to the reprint with additions as the EXPOSE reprint.

The plaintiffs alleged in the complaint that defendants "knowingly, falsely, and maliciously, in reckless disregard for the truth" printed, published, and distributed the EXPOSE and Anderson reprints to the general public and to employees of the Medical Center, URI, and the city of Newport. In addition, plaintiffs averred that the reprints were intended to convey, and did convey, that plaintiffs "were associated with the Mafia, a national-crime organization, and that [Lyons] had misused funds and committed perjury before a Senate committee." Further, plaintiffs alleged that defendants had failed to investigate the facts asserted before publishing the reprints and knew or should have known that the investigations by the Justice Department and the

Labor Department had been concluded. As a consequence of defendants' actions, plaintiffs maintain that the republications injured plaintiff NAGE as a labor organization and plaintiff Lyons "in his profession as a labor leader and in his individual personal standing and reputation as a leading citizen."

At trial plaintiffs and defendants stipulated to the fact that the investigations by the Justice Department and the Labor Department ended in December 1972 and that no charges against Lyons resulted from those hearings. In addition, the parties agreed that plaintiffs were public figures for purposes of this libel action. Conflicting evidence was presented at trial regarding which of the reprints had been distributed, by whom, and during which campaign. The evidence was also contradictory on defendants' knowledge of the alleged falsity of the reprints.

On behalf of plaintiffs, Lyons testified that he traveled to Washington, D.C., to appear before the Senate subcommittee following allegations of impropriety. He admitted that the Anderson article was true on the date of publication, October 31, 1972, but stated that the reprints were inaccurate at the time of distribution. Lyons also noted that he constantly received telephone calls at work and at home regarding his alleged affiliation with the Mafia. Following the appearance of the reprints, Lyons testified that the publication had a terrible effect on his physical and mental well-being. He also stated that the reason defendants distributed the article was to destroy him and NAGE. Mrs. Lyons corroborated his testimony concerning the column's effect on her husband.

Warren Olson, an AFSCME representative, gave testimony concerning the election at the Rhode Island Medical Center. He stated that he had seen the Anderson reprint and distributed the article at the medical center. Olson, however, noted that he had not seen the EXPOSE reprint. Olson related that he had made several

thousand reproductions of the Anderson reprint and added, "we told everyone to get one."

Before disseminating the reprint, Olson testified that he did not investigate or compile any information concerning the outcome of the investigations. Olson stated, however, that he had no idea that the article was false and based his confidence in the truth of the publication on Jack Anderson, a reliable source. In addition he noted that the article was distributed for informational purposes only.

Harry Breen, national executive secretary of NAGE, contradicted Olson's testimony. During the election campaign, Harry Breen stated that he observed AFSCME employees John Breen (no relation to Harry) and Warren Olson distributing the EXPOSE reprint at the medical center. Harry Breen testified that when he asked John Breen, a former NAGE employee, and Warren Olson why they were disseminating the article when they knew it was a lie, they responded, "We know it is a lie but the employees don't know it's a lie."

John Breen and Warren Olson, however, denied ever having the above conversation with Harry Breen. John Breen admitted having seen the Anderson reprint in 1972, when he was employed by NAGE, and acknowledged that he was aware that the investigations had ended. Warren Olson stated that he had no knowledge of the truth or falsity of the article and never discussed that topic with John Breen.

Conflicting testimony was also presented in regard to the distribution of reprints at URI. Warren Olson testified that he did not remember if the article was disseminated at the university. Alternatively Harry Breen again testified that Warren Olson and John Breen distributed the EXPOSE reprint. John Breen flatly denied the allegation. Robert DiRamio of NAGE testified, stating that he was assigned by Harry Breen to concentrate on the election at URI during April and May of 1976. He admitted not seeing the reprints at URI and

stated that, to his knowledge, Harry Breen was not present at the university.

In regard to the Newport election, J. Howard Duffy testified through deposition that he participated in the election by mailing leaflets to union members and by sending campaign literature. He acknowledged that the leaflet dated September 15, 1976, on Rhode Island Public Employees Council 70 letterhead to the members of local No. 911 included a reprint. The words "be sure and read the Jack Anderson pamphlet" were included at the end of the cover letter, according to Duffy.

Duffy also testified that he had no knowledge of whether the investigation was ongoing at the time he authorized the mailing and believed that the reprint conveyed important information to voters in the election. He noted that he failed to investigate because "Jack Anderson is reputed to be one of the most competent newspapermen in the country." Duffy stated that the reprint was obtained from Warren Olson, who substantiated this assertion.

The defendants presented testimony from Elizabeth Gilmore, Patrick Berrigan, and Yvonne Smith. Gilmore, a retired city of Newport employee and member of local No. 911, recalled the election between AFSCME and NAGE. She stated that the article had no effect on her decision in the election, maintaining that, "[j]ust because someone says something it does not mean it's true." Berrigan, a maintenance employee for the State of Rhode Island, stated that he remembered the election and had seen the Anderson reprint but not the EXPOSE reprint. Newport city employee and former member of local No. 911, Yvonne Smith, testified that she did not remember receiving a letter containing the Jack Anderson article.

The AFSCME acknowledged receipt of a March 9, 1976 letter from attorneys representing NAGE, prior to the URI and Newport elections. The letter was addressed to the AFSCME president, Jerry Wurf, and

informed him that the republication of the column constituted libel because the investigations discussed in the Anderson article had concluded favorably to NAGE and Lyons. The attorneys suggested in the letter that AFSCME stop distributing the column because of its false and defamatory nature.

In addition AFSCME admitted receiving a second letter sent on May 21, 1976, from a NAGE attorney advising AFSCME's general counsel that the EXPOSE column had been distributed or posted on bulletin boards in Newport on May 18, 1976, by AFSCME agents. The letters were allowed into evidence at trial only to show notice to defendants of plaintiffs' claims.

Donald S. Wasserman, assistant to the president for Collective Bargaining Services, in reply to the letters stated at trial that he sent a handwritten memorandum to members of his immediate staff, directing them not to send out the Jack Anderson article. After receiving the second letter of May 21, 1976, Wasserman testified that he failed to act because he had already addressed the issue by sending the memorandum. Following the letters, Wasserman stated that no requests for information on Lyons and NAGE were made.

At the end of the presentation of evidence, defendants moved for a directed verdict. The trial justice reserved judgment, finding that the case should go to the jury because of the serious issues involving credibility and other findings of fact. Then the trial justice instructed the jury and provided it with special interrogatories to determine the liability, if any, of each defendant to either plaintiff.

The jury found defendant Rhode Island Public Employees Council 94 liable to Lyons for $50,000 compensatory damages and to NAGE for $25,000 compensatory and $150,000 punitive damages. Liability of AFSCME was established in the amount of $225,000

compensatory damages to Lyons and $225,000 compensatory and $600,000 punitive damages to NAGE. No liability was found on the part of local No. 911.

The defendants then brought motions for a remittitur or for a new trial on the ground that the verdict was contrary to the law and the weight of the evidence. The trial justice rejected the motion for a directed verdict, finding that plaintiffs had established proof in this case. The defendants now claim error in the denial of the motions.

We discussed the elements of an action in defamation when this case first came before this court. *Lyons v. Rhode Island Public Employees Council 94,* 516 A.2d 1339 (R.I. 1986). An action in libel requires "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher." *Id.* at 1342 (quoting Restatement (Second) *Torts* § 558 (1977)). We also stated in *Lyons* that: " '[a]ny words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt are in their nature *defamatory.*' " 516 A.2d at 1343 (quoting *Elias v. Youngken,* 493 A.2d 158, 161 (R.I. 1985)). We finally noted that actionable libel can be constituted by written or printed signs or descriptions. *Lyons,* 516 A. at 1343 (discussing *Henry v. Cherry & Webb,* 30 R.I. 13, 18, 73 A. 97, 99 (1909)).

In determining whether a statement is false and defamatory, we must give the words their ordinary meaning in the community, *J.A. & R.A. Reid v. Providence Journal Co.,* 20 R.I. 120, 37 A. 637 (1897), and not isolate them from the circumstances in which they were published. *Della Posta v. Rand Express Freight Lines, Inc.,* 86 R.I. 148, 133 A.2d 775 (1957). The words also must be reviewed in the context of the publication in which they appear taken as a whole. *Bray v. Providence Journal Co.,* 101 R.I. 111, 220 A.2d 531 (1966).

If, as stipulated here, a public official or public figure brings a defamation action, it is constitutionally required that he prove by clear and convincing evidence that the particular falsehood alleged was asserted with actual malice. *New York Times Co. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *DeCarvalho v. daSilva,* 414 A.2d 806, 812 (R.I. 1980). The clear and convincing evidence standard to prove actual malice has been defined as "intermediate between the normal 'preponderance of the evidence' civil standard and the 'beyond a reasonable doubt' criminal standard." *Loeb v. New Times Communications Corp.,* 497 F. Supp. 85, 92 n. 11 (S.D. N.Y. 1980). Actual malice can be demonstrated by establishing that a publisher knew of its falsity or acted in reckless disregard of whether it was false. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964).[2] This burden of proof is on the public-figure plaintiff. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775, 106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783, 792 (1986).

In finding whether "clear and convincing" evidence of "actual malice" exists, we must independently examine the whole record. *New York Times Co. v. Sullivan,* 376 U.S. at 285, 84 S. Ct. at 729, 11 L. Ed. 2d at 709. The usual "clearly erroneous" standard of appellate review is not applicable, so we must examine mixed findings of fact and law to determine the issue of actual

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2. We have frequently applied the actual malice rule. *See Major v. Drapeau,* 507 A.2d 938, 941 (R.I. 1986) (for public figure to recover for defamation "reckless disregard" is more than mere negligence); *Martin v. Wilson Publishing Co.,* 497 A.2d 322, 330 (R.I. 1985) ("actual malice" test of United States Supreme Court's *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) decision used to ascertain truth of underlying defamatory statements); *Hall v. Rogers,* 490 A.2d 502, 505 (R.I. 1985) (failure to verify information alone, does not constitute "recklessness" for purposes of establishing "actual malice"); *Hawkins v. Oden,* 459 A.2d 481, 484–85 (R.I. 1983) (*New York Times* test applied to defamation action).

malice. The United States Supreme Court has explained the variation of de novo review from the policy of deference to the trial fact-finder as follows:

> "[T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression would not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 505, 104 S. Ct. 1949, 1962, 80 L. Ed.2d 502, 519–20 (1984).

This duty of independently reviewing the entire record stems from the importance of preserving the liberties of the First Amendment to the United States Constitution. *Id.* We now exercise our independent appellate review of the evidence presented at trial.

In order for us to uphold the verdict, the record must independently support the assertion that the alleged defamatory material contains a false and defamatory statement of fact. In addition clear and convincing evidence must exist to establish that the false and defamatory statement of fact was published with actual malice.

We have previously observed that the facts as reported by Jack Anderson were true when the article was first published on October 31, 1972. *Lyons,* 516 A.2d at 1344–45. Kenneth Lyons was under investigation for alleged perjury by the Justice Department. The Labor Department was also "looking into" misuse of union funds by Lyons and NAGE.

The reprints were also accurately dated. The EXPOSE and Anderson reprints contained the date of publication above the text. The type used to display the date was larger than the text print in both reprints. The style was also different from the type utilized in the original column. In the EXPOSE reprint the date was placed directly next to the article's heading.

Aside from the fact that the original article was dated and accurate, the text referred to Richard Nixon as President of the United States. We said in *Bray* that publications must be considered in their entirety in determining whether they are false and defamatory. The majority of the original column was devoted to a discussion of the upcoming 1972 presidential election between Nixon and McGovern. These historical references indicate that the reprints referred to prior events and not to matters occurring in 1975 and 1976.

We have repeatedly stated that we shall not isolate words from the circumstances in which they were spoken. The Jack Anderson column was republished during a heated labor-election campaign. The important constitutional concerns regarding free speech are greatest when a publication is political and is distributed during an election. *See Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 300–01, 91 S. Ct. 628, 632, 28 L. Ed. 2d 57, 62 (1971) (speech protected during campaign or election); *Mills v. Alabama,* 384 U.S. 214, 218–19, 86 S. Ct. 1434, 1436–37, 16 L. Ed. 2d 484, 487–88 (1966) (political publication protected because of First Amendment concerns).

Reading these reprints in their historical context, noting the insertion of the October 31, 1972 date, and realizing that the reprints were republished during heated labor elections, we find that the jury is prevented from concluding that the article was false and defamatory. Therefore, we find that the EXPOSE and Anderson reprints did not contain a false and defamatory statement of fact.

In considering whether the alleged falsehood was asserted with actual malice, we review whether the disseminator of the article knew of its falsity or acted in reckless disregard of the truth. Actual malice defined is "a term of art" established as a standard of liability necessary for a state to constitutionally allow public-figure plaintiffs to recover damages in libel actions against publishers. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251, 95 S. Ct. 465, 470, 42 L. Ed. 2d 419, 426 (1974).

According to the trial testimony of J. Howard Duffy and Warren Olson, they believed that the information in the column was relevant and important for voters at the medical center, URI, and Newport in choosing a collective-bargaining representative. Olson specifically testified that the reprints were disseminated for informational purposes. Similarly, Duffy noted that "I felt that it was important for the union members to read every word that was in the article." Donald Wasserman believed that the reprints contained valid information relevant to the election.

These individuals also testified that they did not know or suspect that the reprints were false. Olson added that he had accepted the article as truthful because of the credibility of Jack Anderson as a syndicated columnist. Duffy declared that "Jack Anderson is reputed to be one of the most competent newspapermen in the country." Wasserman informed his staff to stop distribution of the article immediately, after receiving a letter from NAGE's attorneys. He noted, however, that the October 31st column was accurate even after realizing the investigations had been closed.

Participants involved in a campaign anticipate that charges and countercharges will be asserted during the course of an election. Elizabeth Gilmore's comment that "[j]ust because someone says something does not mean it's true" emphasizes this point. In the context of a labor

election, the evidence presented at trial does not establish actual malice.

The plaintiffs would like us to rely on Howard Breen's testimony and John Breen's knowledge that the investigations had terminated favorably for plaintiffs. Although John Breen was aware that the investigations were over when the reprints were distributed, he testified that he never handed out any reprints. In addition John Breen stated that he never discussed with Warren Olson or any other AFSCME personnel the fact that the investigations had ended. Therefore, we find that no clear and convincing evidence exists to establish that defendants distributed the reprints with knowledge of or reckless disregard for their falsity.

In reaching the above conclusion, we are cognizant of the fact that the defendants could have provided additional information in disseminating the reprints. We have held, however, that "[a]s long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error." *Hall v. Rogers,* 490 A.2d 502, 505 (R.I. 1985) (quoting *Ryan v. Brooks,* 634 F.2d 726, 734 (4th Cir. 1980)). Here the columns were republished in their entirety. Additional information suggesting that the investigation was ongoing was lacking. The date of publication was affirmatively added for clarification. Finally, the trial transcript suggests that the dissemination of the reprints, while attempting to influence the election, was accomplished without any knowledge of falsity or reckless disregard for the truth.

The plaintiffs also cross-appeal from the denial of their motion to file a third amended complaint. We recently held that the final decision whether to allow an amendment of a complaint under Rule 15 is in the discretion of the trial justice. *Order of St. Benedict v. Gordon,* 417 A.2d 881, 883 (R.I. 1980). We believe that

the trial justice was correct in denying the plaintiffs' motion to amend. Therefore, the plaintiffs' cross-appeal is denied.

After exercising independent review, we find that the quantum of proof advanced to establish libel falls short of clear and convincing evidence of actual malice. Hence, no new trial is permissible. The trial justice's denial of the plaintiffs' motion to amend is affirmed, and the case is remanded to the Superior Court with direction to enter judgment for the defendants.

KENNETH T. LYONS ET AL. :

v. :

No. 84-118-Appeal.

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 ET AL. :

Supreme Court of Rhode Island.

Oct. 30, 1986

## OPINION

KELLEHER, Justice. In this Superior Court action for libel the jury returned a verdict for the defendants. Subsequent to the verdict, the trial justice denied defendants' motion for a directed verdict which was made at the conclusion of the presentation of all the evidence. The decision had been deferred pending the return of the jury's verdict. A second trial justice heard and denied the plaintiffs' motion for a new trial.[1] The plaintiffs now appeal from the various rulings made during the trial and from the denial of their motion for a new trial. The defendants cross-appeal from the denial of their motion for a directed verdict.

This controversy arose out of the alleged dissemination of reprints of a 1972 newspaper article during election campaigns in 1975 and 1976 between two labor organizations vying for the right to represent certain Rhode Island state and municipal employees in collective-bargaining matters. The elections took place at the Rhode Island Medical Center on December 29, 1975, the University of Rhode Island (URI) on June 10, 1976, and the city of Newport on September 27, 1976, all of which plaintiffs lost. The plaintiffs are the National

1. The first trial justice died before the plaintiffs' motion for a new trial was heard. A successor judge was appointed in accordance with Super.R.Civ.P. 63.

Association of Government Employees, Inc. (NAGE), and its President, Kenneth Lyons (Lyons). The defendants are the president and the secretary/treasurer of the American Federation of State, County, and Municipal Employees (AFSCME), an international union; the president and secretary of Council 94, council for the State of Rhode Island Public Employees, affiliated with AFSCME; and the president and secretary/treasurer of local 911, an affiliate of AFSCME representing Newport city employees.

The article at issue, written by Jack Anderson, was originally published as a syndicated column in the New York Post on October 31, 1972, and was entitled "The Investigation." The column discussed federal investigations into activities of plaintiffs Lyons and NAGE that were being conducted by the United States Department of Justice and Department of Labor. After describing Lyons as "[o]ne of President Nixon's favorite labor leaders," the article read in part, "Justice is studying whether he [Lyons] committed perjury in a Mafia-related case, and Labor is investigating charges that he misused union funds."

The column indicated that Lyons's "trouble with the Justice Department" began with Senate testimony about a detergent product "linked to an underworld family with a record for strong-arm business tactics." According to the article, the maker of the detergent had testified before a Senate Committee that when he had come to Boston at Lyons's request to discuss the detergent, one of their companions at lunch and dinner was a nephew of the former "godfather" for western Massachusetts. After the detergent manufacturer appeared before the committee, the article continued, Lyons demanded the opportunity to testify and appeared without a lawyer to deny all the allegations. Because of the contradictions in the Senate record, it was referred to the Justice Department for possible perjury prosecutions. The article also reported that the charges as to misuse of

union funds, brought by union dissidents, were also denied by Lyons in a telephone conversation with the reporter.

One of the reprints allegedly distributed by defendants in 1975 and 1976 was an exact photocopy of the Anderson article, with the addition of "New York Post, October 31, 1972" in the top right-hand corner of the page. In the second reprint, the entire article was encircled by a black line, the words "EXPOSE, Jack Anderson looks at NAGE," were printed in bold black letters as a headline across the top, and several phrases were underlined in black. Underscored phrases included: "Kenneth T. Lyons"; "perjury in a Mafia-related case"; "charges that he misused union funds"; "National Assn. of Government Employees"; "is linked to an underworld family with a record for strong-arm business tactics"; "godfather." The words "New York Post—October 31, 1972" were printed above Jack Anderson's byline in print different from that in the article, seemingly having been typed in on the original from which the photocopied reprint had been made. For ease of reference, we shall refer to the exact reprint of the article as the "Anderson reprint" and to the marked reprint as the "EXPOSE reprint." The EXPOSE reprint is reproduced in full in the appendix at the end of this opinion.

The parties stipulated to the fact that the investigations mentioned in the article came to an end in December of 1972 and that no charges were brought against Lyons as a result of those investigations. They also agreed that for the purposes of this action, plaintiffs would be considered public figures. It is not contested that the facts as reported by Jack Anderson were true when his article was originally published in October 1972, although at trial Lyons initially attempted to deny that he was "investigated."

In their complaint, plaintiffs alleged, inter alia, that defendants "knowingly, falsely and maliciously in reckless disregard of the truth" printed, published, and

disseminated the EXPOSE reprint[2] in 1975 and 1976, during the course of each of the union campaigns, to members of the public and to employees of the Medical Center, URI and the city of Newport; that they did so with the intent to convey, and did convey, the impression that plaintiffs "were associated with the Mafia, * * * had committed perjury before a Senate Committee and were linked with an underworld 'family,' and * * * that the plaintiff Lyons had 'misused union funds' "; and that plaintiffs were "still, at the time of the publication, the subject of criminal investigations." The plaintiffs alleged that the statements in the publications were false when made by defendants, Lyons having been "exonerated" of any wrongdoing by the termination of the investigation. They further alleged that defendants, having been notified of the falsity of the publication, failed to investigate the truth of the facts they published and were thus guilty of "reckless disregard" for the truth in publishing the EXPOSE article as they did. As a direct result of defendants' actions, plaintiffs continued, they were caused injury and damage including, but not limited to, loss of membership of and rejection by the public employees of Rhode Island, who prior to the distribution of the article had indicated that they were going to join NAGE.

Conflicting evidence was presented at trial as to which of the reprints had been circulated during which campaigns, as to the awareness of those who acknowledged having circulated either reprint of its alleged "falsity," and as to which defendant was responsible for which distribution.

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2. Although plaintiffs' complaint alleged libel only as to the EXPOSE reprint, the trial justice, prior to closing arguments, allowed an amendment to include the unaltered Anderson reprint as well.

Warren Olson, a representative of the international union, AFSCME, testified that he distributed the unaltered Anderson reprint at the Rhode Island Medical Center in September 1975 and that he had no idea that the article was false in any way. His testimony was contradicted by that of Harry Breen, national vice president of NAGE, who testified that he had observed Warren Olson and John Breen, another employee of AFSCME, distributing the EXPOSE article at the Medical Center approximately eight or nine days before the December 1975 election. He stated that when he asked them why they were distributing it when they knew it to be a lie, they responded, "We know it's a lie but the employees do not know it's a lie."

John Breen (no relation to Harry) testified that from October through December of 1975 he assisted in the campaign against NAGE at the Medical Center. He denied ever having seen either of the reprints during that period or having talked about either of them with Warren Olson or with Harry Breen. He acknowledged having seen the Anderson reprint when employed by NAGE in 1972 and knowing at that time that the investigations had been concluded.

There was also conflicting testimony as to the alleged distribution at URI of either of the reprints prior to the election there in June of 1976. Harry Breen again testified that he had seen Olson and John Breen distributing the EXPOSE article, and Olson and Breen denied it. Robert DiRamio testified that he had worked in the New England area during 1975 and 1976, that he had been at URI off and on during April and May of 1976 prior to the election there, that he had not seen a leaflet containing the Anderson article, and that Harry Breen, to his knowledge, was not at the university at any time.

In regard to the Newport election, J. Howard Duffy, staff representative for AFSCME council 70, who serviced local 911 in Newport, testified that he drafted and authorized the mailing of a letter, dated September 15,

1976, on AFSCME council 70 stationery, to the members of local 911, attached to which there was an EXPOSE reprint. At the end of the cover letter, which discussed the virtues of AFSCME as opposed to NAGE representation, were the words "Be sure and read the Jack Anderson pamphlet." Duffy testified that he had received the EXPOSE reprint from Warren Olson, who acknowledged only that he had provided Duffy with the Anderson reprint for informational purposes. Duffy testified that he had relied upon the reputation of Jack Anderson, and did not know, nor did he attempt to verify, whether an investigation was going on at the time he authorized the mailing of the EXPOSE article.

AFSCME acknowledged having received a letter in March of 1976, prior to the URI and Newport elections, sent by attorneys representing NAGE in other litigation involving Lyons in the U.S. District Court in the District of Columbia, to Jerry Wurf, president of AFSCME. The letter, as admitted into evidence,[3] informed Wurf that the republication of the article constituted the basis of a libel action because the investigations referred to in the Anderson article were concluded favorably to NAGE and Lyons in December of 1972. The letter suggested that AFSCME terminate distribution of the article because of its "falsity" and its defamatory nature.

AFSCME also acknowledged the receipt of a letter sent by an attorney for NAGE on May 21, 1976, to the general counsel of AFSCME, advising him that the EXPOSE article had been distributed or posted on

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3. As originally received by Wurf, the letter noted that it was the opinion of the chief judge in the District of Columbia litigation that the republication of the article constituted actionable libel; the text of the opinion was attached to the letter. The plaintiffs' attempt to have the entire document admitted into evidence was thwarted by the trial justice, who ruled that its admission even as evidence of the state of mind of the defendants would be prejudicial to the defendant. The trial justice allowed the admission of the letter only, with all reference to the District Court decision deleted.

bulletin boards in Newport on May 18, 1976, by agents of AFSCME. Both letters were admitted only as evidence of notice to defendants of plaintiffs' claims and not for the truth of their contents.

At the end of all the evidence, defendants moved for a directed verdict, on which the trial justice reserved judgment. He instructed the jury and provided them with special interrogatories that sought a breakdown as to whether either plaintiff, Lyons or NAGE, was libeled by any of the three defendants. No breakdown was sought as to which of the elements of libel were or were not found in each instance. The jury found no libel by any of the defendants as to either plaintiff.

After the verdict, the trial justice denied defendants' motion for a directed verdict as to both claims. The plaintiffs brought a motion for a new trial on the grounds that the verdict was contrary to the law and the weight of the evidence, which motion was denied. The plaintiffs now claim error in the denial of that motion, in the instructions given the jury, and in the exclusion of certain evidence.

Before addressing plaintiffs' claims, a brief overview of the elements of an action in defamation is in order. It is well settled, although we have not specifically so held at one time, that such an action requires proof of "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher"; and (d) damages, unless the statement is actionable irrespective of special harm. Restatement (Second) *Torts* § 558 (1977). As to the first element, principally at issue in this appeal, Rhode Island law incorporates the concept of falsity into its definition of a defamatory statement.[4] According to our cases,

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4. This factor sometimes leads to confusion, the word "defamatory" at times being used to include the element of falsity and at times only to refer to the particular type of language — i.e.,

> " '[a]ny words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred and contempt are in their nature *defamatory*.' " *Elias v. Youngken,* 493 A.2d 158, 161 (R.I.1985).

Libel consists of such a statement " 'expressed in printing or writing, or by signs, pictures, [etc.]. . . . ' " *Henry v. Cherry & Webb,* 30 R.I. 13, 18, 73 A. 97, 99 (1909). If the plaintiff is a public official or public figure, it is constitutionally required that he prove by clear and convincing evidence that the communication was published with "actual malice" – that the publisher knew of its falsity or acted in reckless disregard of whether it was false. *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964); *DeCarvalho v. daSilva,* 414 A.2d 806, 812 (R.I.1980). Although truth is an absolute defense to a charge of libel, *Perry v. Man,* 1 R.I. 263, 265 (1849), the burden of proof of falsity is upon the public-figure plaintiff. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. ____, ____, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, 792 (1986).

Words alleged to be defamatory must be read in the context of the publication in which they appear, taken as a whole. *Bray v. Providence Journal Co.,* 101 R.I. 111, 116–17, 220 A.2d 531, 534–35 (1966). The suspect verbiage is to be construed in its "plain and ordinary sense * * presumed to have [been used] in their ordinary import in the community in which they are uttered or published." *J.A. & R.A. Reid v. Providence Journal Co.,* 20 R.I. 120, 122, 37 A. 637 (1897). However, words cannot be isolated from the circumstances in which they are uttered. *See Della Posta v. Rand Express Freight*

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NOTES *(Continued)*

injurious to reputation, and so forth. The fact that "defamation" is also the name of the tort serves only to add to the confusion that, as will be seen, runs throughout this controversy.

*Lines, Inc.*, 86 R.I. 148, 133 A.2d 775 (1957). "[T]he decisive question is what the person * * * to whom the communication was published reasonably understood as the meaning intended to be expressed." Restatement (Second) *Torts* § 563(e) (1977).

Although plaintiffs have charged the trial justice with committing several errors during the course of the trial, in our opinion the decisive issue in this dispute is the denial of plaintiffs' motion for a new trial by the Superior Court justice who considered the new-trial motion.

In their new-trial motion plaintiffs alleged that the jury's verdict was against the weight of the evidence. As noted earlier in this opinion, the trial justice died after the new-trial motion was filed but before he could give any consideration to the motion's merits. Subsequent to the trial justice's death, the presiding justice of the Superior Court, acting pursuant to the terms of Rule 63 of the court's Rules of Civil Procedure, appointed another member of the court to act as a successor justice.

In its pertinent portions, Rule 63 provides that whenever a trial justice, because of death, illness, or other disability, is unable to perform the duties of the office after a jury verdict has been returned, the presiding justice can designate a successor justice who may consider and determine the motion. However, if the successor is of the belief that s/he cannot resolve the motion because the successor was absent from the trial or for any other reason, the successor "may make such order as the circumstances may require."

Here, the successor justice was completely conversant with the court's holding in *Ruggieri v. Beauregard,* 110 R.I. 197, 291 A.2d 413 (1972), where a successor justice, after considering a motion for a new trial that had alleged that the jury's award for pain and suffering was inadequate because it was against the weight of the evidence, granted the motion and awarded the plaintiff an additional $3,400. In vacating that award, this court

emphasized that in this jurisdiction a Superior Court justice, when considering a new-trial motion challenging the sufficiency of the evidence, becomes a "superjuror" who is required to make an independent evaluation of the evidence, including such matters as assessing the credibility of the witnesses and determining the weight of the evidence. The court in *Ruggieri* also stressed that as a general rule credibility cannot be assessed by one who has neither seen nor heard the witnesses. Thus, the grant of the additur was set aside as an "abuse of discretion" and the case remanded to the Superior Court for a new trial.

Here, the successor justice acknowledged his inability to make any assessment of credibility but proceeded to deny plaintiffs' motion by taking an approach that is innovative and imaginative but falls far short of satisfying the controlling principles set forth in *Ruggieri*. In rejecting plaintiffs' new-trial motion, the successor justice found issues of credibility only as to the questions of publication and malice and assumed that plaintiffs had sustained their burdens in those two areas. He also assumed that the EXPOSE article, if false, was defamatory, observing, "To state that someone is under investigation by the U.S. Labor Department for misuse of funds, if false, is defamatory." However, he then determined that there was no question of credibility on the "vital issue upon which this case turns * * * the truth or falsity * * * of the EXPOSE article." The successor justice reasoned that since no evidence had been presented to indicate that Lyons had not been under investigation in October 1972, the article was literally true when printed. He admitted that plaintiffs' argument that the article became untrue or false when circulated in 1975 and 1976 would have "carried the day had the publication not contained the date October 31, 1972." "No reasonable minds," declared the successor justice, "who read the article in 1975 or 1976 would conclude that the article spoke of that time and that there were

pending investigations." In the successor justice's opinion, the insertion of the October 1972 date within the reprints circulated in 1975 and 1976 "prevents any jury from concluding that the article was false."

In further explaining his rationale for the approach taken in rejecting plaintiffs' new-trial motion, the successor justice alluded to the so-called appellate rule that this court invokes whenever a trial justice fails to discharge his or her obligation when considering a motion for a new trial following a jury verdict. In *Belanger v. Cross,* 488 A.2d 410 (R.I. 1985), we again emphasized, as we have in numerous cases, that in situations in which the trial justice has failed to discharge his duties in the consideration of a new-trial motion, this court will apply the appellate rule and examine the evidence in the light most favorable to the prevailing party to determine if there is any competent evidence that, if believed, would support the jury's verdict. If there is, the motion for a new trial will be denied. The trial justice wondered aloud, "[I]f the Supreme Court can use the appellate rule in these circumstances, why can't the hearing judge in these circumstances use the appellate rule?"

The response to this inquiry is, of course, that the appellate rule comes into play only after a trial justice has considered a new trial motion and has afforded the opportunity to assess the witnesses' credibility and determine the weight of the evidence. This court believes that an essential part of the Superior Court jury trial process is an evaluation of a motion for a new trial by the justice who presided at trial. Nevertheless, when there has been a misconception of material evidence in the consideration of that new-trial motion, this court is no longer required to give to the trial justice's consideration that deference given when the consideration of the motion is flawless.

In this controversy no one disputes that credibility of the witnesses was in issue. In essence, plaintiffs have

charged defendants with publishing what might be called a "half truth." There is no question that in 1972 Anderson was right on target when he reported that Lyons was the subject of an ongoing Justice Department and Labor Department investigation. The article was peppered with numerous provocative references to whether Lyons had committed perjury in a Mafia-related case or misused union funds. The detergent is described as being linked to an underworld family with a record for strong-arm business tactics. One of Lyons's dining companions was identified as a nephew of a deceased "mob godfather" for western Massachusetts.

Here, everyone concedes that the investigations were not in progress when the articles were being distributed in the organizational war going on in 1975 or 1976. Again, Anderson's article was embellished in the so-called EXPOSE publication when some unknown individual undertook the task of underlining the phrases to which we have just referred. Two thousand copies of the Anderson article were printed for distribution during the Medical Center campaign. Close to two hundred copies were also prepared for the Newport confrontation.

The successor justice's unquestioned belief that no reasonable person would be deceived by the republication of the Anderson article is somewhat at odds with the evidence presented at trial by NAGE's national vice president, who testified that two employees of the national union who were distributing the EXPOSE article at the Medical Center allegedly said, in response to the vice president's query, "We know it's a lie, but the employees do not know it's a lie."

Again, it should be noted that after the jury had returned its verdict, the trial justice, who had reserved decision on defendants' motion for directed verdicts, in denying the motion, observed:

> "I feel that the jury could have found that the distribution of Exhibit No. 1 [the Medical Center distribution] so many years after [publication]

> * * * [renders it] conceivable that the jury could have found that there was knowledge of the termination of the investigations, and that the dissemination of the information in 1975 or 1976 did misinform * * * or could have misinformed the ordinary reader who might have felt at that point that the article indicated that the investigation was still continuing."

Thus, although we commend the successor justice for his attempt to resolve a most difficult situation, we see no reason to depart from what was emphasized and stressed in the *Ruggieri* case. A new trial is mandated.

We are concerned that the trial justice in his charge to the jury consistently referred to "articles published by the defendants." However, to be exact, there was but one publication of the Anderson article, and that occurred in 1972. The defendants' efforts in circulating Anderson's article should be more properly described as republications of the article. Recently, in *Martin v. Wilson Publishing Co.*, 497 A.2d 322, 330 (R.I.1985), we refused to countenance the republication of false or baseless rumors by the media. Concededly, here we are dealing with the republication of an article that was accurate on the day of publication but somewhat less than accurate at the time of its republication. Thus, we think it incumbent that on retrial the jury be instructed that in determining whether the republications in this case were false and defamatory, the decisive question is what the persons to whom they were disseminated in 1975 and 1976 reasonably understood as the meaning intended to be expressed by the disseminators.

As noted earlier, the defendants have filed a cross-appeal in which they challenge the denial of their motion for directed verdicts. Their contention merits little discussion for the record does contain competent evidence which would warrant the jury in returning verdicts and award of monetary damages for each plaintiff against each defendant.

The plaintiffs' appeal is sustained, and the judgment appealed from is vacated. The defendants' appeal from the denial of their motion for a directed verdict is denied and dismissed.

BEVILACQUA, C.J., participated in the oral argument and in the decision of the court but retired prior to the publication of this opinion.

APPENDIX

**EXPOSE**
**Jack Anderson**
**looks at NAGE**
New York Post — Oct 31, 1972
**Jack Anderson**

**THE INVESTIGATION**

WASHINGTON.

One of President Nixon's favorite labor leaders, who has been inducted into the Republican holy of holies, is under double-barreled federal investigation.

Both the Justice and Labor Depts. are looking into the doings of **Kenneth T. Lyons,** a tough and talkative union boss now serving as national vice-chairman of Democrats for Nixon. Justice is studying whether he committed **perjury in a Mafia-related case** and Labor is investigating **charges that he misused union funds.**

Lyons heads not only the 100,000-strong **Natl. Assn. of Government Employees** but, embarrassingly for him in the present circumstances, the 30,000-member Intl. Brotherhood of Police Officers.

* * *

But while government gumshoes have been checking on Lyons, President Nixon has been courting him. The President has appointed him to the prestigious White House higher education advisory council and has invited him to at least two White House affairs.

As an officer of Democrats for Nixon, Lyons also attended the exclusive Texas barbecue which ex-Treasury Secretary Connally threw for Nixon. But Lyons' entree to the councils of the mighty hasn't deterred the federal sleuths.

His trouble with the Justice Dept. began last June with Senate testimony about a detergent called **Poly-Clean.** The product, according to the Senate testimony,

**is linked to an underworld family with a record for strong-arm business tactics.**

The detergent's maker, David Weiner of Palmer, Mass., was called on the witness stand. His testimony and vouchers he produced showed that, at Lyons' request, he made four trips to Boston to discuss Poly-Clean.

**One of their lunch and dinner companions,** the vouchers show, **was Tony Camerota.** He is a nephew of the late Nick Camerota, who was the mob **"godfather"** for western Massachusetts until his recent demise.

**Finally, the vouchers tell of an agreement between Weiner and Lyons for distributing Poly-Clean through a company called "Noreast Sales Corporation." Talks about the deal lasted for hours, the vouchers attest.**

After Weiner's damning statements, Lyons demanded to testify before the committee. He appeared without a lawyer to deny all the allegations. He swore he didn't know Camerota, had never heard of Noreast Sales Corp. and couldn't recall Weiner's "ever buying me a cup of coffee."

Lyons also testified that he had met with Weiner twice, not four times, that Weiner had tried to get him to push Poly-Clean, but that he had rejected the deal.

The Senate record was so shot with contradictions that it was referred to the Justice Dept. for possible perjury prosecutions. Within the last few days, the Senate has also sent Justice an article from the Boston Globe identifying two new prospective witnesses in the case.

As for the probe into **Lyons's alleged misuse of union funds,** the charges were brought by union dissidents. The Labor Dept. will confirm only that the investigation deals with "financial affairs."

We reached Lyons in Boston for his comments. He talked at length without notes, repeating the same detailed denial he had given under oath to the Senators.

"The thing is so unreal," he said of the Poly-Clean case. "It comes as a complete mystery to me." On the alleged misuse of funds, he was "confident" he would be cleared.

Weiner, in an earlier talk with my associate Les Whitten, said he ran a clean company with no Mafia ties. He also stuck to his Senate testimony.

It may take the courts to resolve the conflicting stories.

* * *

A number of Democratic hopefuls, anticipating George McGovern's defeat next week, are already jockeying for positions in the 1976 Presidential sweepstakes.

They include three of the Senate's most able and articulate members—Indiana's Birch Bayh, Idaho's Frank Church and Minnesota's Walter Mondale. All three have told friends, however, that they'll step aside if Sen. Kennedy seeks the nomination.

McGovern is also expected to make a second bid if he isn't too badly mauled by the voters on Nov. 7. But he might have trouble simply keeping his Senate seat, since he must come up for re-election in 1974 in conservative South Dakota.

McGovern's two vice presidential choices, Tom Eagleton and Sargent Shriver, are also making presidential noises in private. But Eagleton wouldn't likely challenge Kennedy and certainly Shriver will give his eminent brother-in-law first crack at the nomination.

The big question mark is whether Kennedy will run. He has told intimates that he's definitely interested but hasn't made up his mind.

Supreme Court, U.S.
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No. 89-229

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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KENNETH T. LYONS, and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,

*Petitioners,*

v.

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94

and

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,

*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island**

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## BRIEF IN OPPOSITION

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**On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island**

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## BRIEF IN OPPOSITION

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### STATEMENT OF THE CASE

The facts of this case are relatively straightforward. In 1975 and 1976, three labor elections took place between, on one side, respondents American Federation of State, County, and Municipal Employees (hereinafter "AFSCME") and Rhode Island Public Employees Council 94 (hereinafter "Council 94") and, on the other side, petitioner National Association of Government Employees, Inc. (hereinafter "NAGE"). Respondents distributed campaign leaflets which consisted of an accurate reproduction of an October 31, 1972 column by investigative reporter Jack Anderson regarding two 1972 investigations

of NAGE's president, petitioner Kenneth T. Lyons. The correct date of the column was prominently displayed on the reprints.

The Jack Anderson column contained no false statements of fact when it was originally published in 1972. In addition to discussing investigations of Lyons by the Departments of Justice and Labor regarding alleged ties to organized crime and the misuse of union funds, the article stated that Lyons was "[o]ne of President Nixon's favorite labor leaders," and "national vice chairman of Democrats for Nixon." The column also discussed the up-coming 1972 presidential election in detail.

The Jack Anderson reprints distributed by respondents in 1975 and 1976 were full and accurate reproductions of the original column. In addition to the dating references within the text of the column, respondents typed the column's original publication date, "October 31, 1972," above the reprint in type larger than that of the column itself.[1] Prior to the distribution of the reprints, however, both federal investigations were concluded with no enforcement actions taken against Lyons. The reprints did not include these facts.

Petitioners brought a libel case based on the dissemination of the reprints which was first tried in 1983 in the Superior Court of Rhode Island.[2] The jury found in favor of all defendants, including respondents. Petitioners' new trial motion was denied by a successor judge after the trial judge died. The Rhode Island Supreme Court remanded the case for a second trial, however, because it found that the new trial motion required assessment of the credibility of the witnesses, which the suc-

[1] Some of the reprints also contained a large headline stating "EXPOSE/Jack Anderson Looks at NAGE," underlinings and one circle around a portion of the text, and a jagged line surrounding the entire article.

[2] Petitioners stipulated that they were "public figures."

cessor judge could not do. At the second trial in December 1987, the jury found respondents liable.[3]

On appeal, however, the Rhode Island Supreme Court reversed, finding that the Jack Anderson reprints contained no false statements of fact and had not been distributed with "actual malice." *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130 (R.I. 1989).[4] Specifically, the court relied on state law in finding that the Jack Anderson reprints did not contain false statements of fact because the references to "President Nixon" and the 1972 election dated the column, the reprints were affirmatively labelled with the original publication date, and the reprints had been distributed in the context of hotly contested labor elections. Additionally, the court independently reviewed the record and did not find clear and convincing evidence that the reprints were distributed with knowledge or reckless disregard of any falsity.

Petitioners now seek review in this Court. Despite petitioners' dramatic claim that the Rhode Island Supreme Court has "given birth to a startling and disquieting new First Amendment 'right'," Petition for Certiorari ("Petn.") at 11, the court below merely applied settled principles of libel law to the particular facts of this case. Respondents respectfully submit that the petition for certiorari should be denied.

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[3] A third defendant, AFSCME Local 911, was found not liable.

[4] Subsequent citations to the opinion below will refer to the pages of the opinion as it is reprinted in the appendix to the Petition, *i.e.*, "Petn. App. at A1."

## REASONS FOR DENYING THE WRIT

### I. The Rhode Island Supreme Court's Finding That the Anderson Reprint Contained No False Statement of Fact Was Based On the Application of Settled Principles of State Law.

The Rhode Island Supreme Court relied wholly on settled principles of state law in finding that the Jack Anderson reprints did not contain any false statement of fact, because a reasonable reader would understand the publication to be a dated, historical document, written at a particular point in the past and not implying any particular facts about the present:

> Reading these reprints in their historical context, noting the insertion of the October 31, 1972 date, and realizing that the reprints were republished during heated labor elections, we find that the jury is prevented from concluding that the article was false and defamatory. Therefore, we find that the EXPOSE and Anderson reprints did not contain a false and defamatory statement of fact.

Petn. App. at A11.

The court considered itself obligated to construe the reprint, as a whole, in the context in which it was published. As the text of the decision makes clear, these requirements were mandated by the court's previous decisions in *Della Posta v. Rand Express Freight Lines, Inc.*, 86 R.I. 148, 133 A.2d 775 (1957), and *Bray v. Providence Journal Co.*, 101 R.I. 111, 220 A.2d 531 (1966). Petn. App. at A8. The court also relied on the Rhode Island definition of "false" and "defamatory" words, citing its previous decision in this case, *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339 (R.I. 1986), as well as that decision's quotation from *Elias v. Youngken*, 493 A.2d 158 (R.I. 1985).

These cases repeat traditional and elementary rules of construction for determining whether a statement expresses or implies a falsehood.

> Words alleged to be defamatory must be read in the context of the publication in which they appear, taken as a whole.

*Lyons*, 516 A.2d at 1343. Thus, the court must consider the entirety of a publication, including its headline, *Bray*, 220 A.2d at 534-35, and must consider the context and reasonable meaning of the words, *Elias*, 493 A.2d at 161-63. These are not constitutional principles, but simple rules of state law which, as construed and applied by judges, control a jury's permissible interpretation of offending words. Moreover, these rules of construction are generally accepted and long-established. *See, e.g.*, Sack, *Libel, Slander, and Related Problems*, 51-55 (1980).

The Rhode Island Supreme Court never states that it was "constitutionally compelled," Petn. at 18, to find no falsity. In fact, its legal analysis is carefully constructed to indicate unmistakable reliance on state law. *See* Petn. App. at A8-A10. After reiterating the three elements required in an action in libel, citing only to its own decisions and to *Restatement (Second) of Torts* § 558 (1977), and discussing the definition of "false and defamatory" under Rhode Island common law, the court states the applicable rules of construction for applying this definition. This section of the opinion relies exclusively on previous decisions of the Rhode Island Supreme Court applying state common law.[5] The court's intention to base its "falsity" analysis exclusively on state law is then underlined by the immediately following discussion of the "actual malice" requirement which, by contrast,

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[5] The decision's only reference to federal concerns in its falsity analysis is its statement that "[t]he important constitutional concerns regarding free speech are greatest when a publication is political and is distributed during an election." Petn. App. at A11 (omitting citation to two decisions of this Court). The Rhode Island Supreme Court's opinion makes clear, however, that the court considered the political context of the speech because of the state law mandate "that we not isolate the words from the circumstances in which they were spoken." Petn. App. at A11.

relies extensively and explicitly on First Amendment principles. Petn. App. at A9-A10.[6]

## II. The Rhode Island Supreme Court Decision Does Not Conflict with Other Precedents.

The Rhode Island Supreme Court did not in this case apply or create a radical new theory of "falsity" which is in conflict with other state courts or with its own earlier decisions. The court below has expressly recognized that a libel cause of action can be based on a false implication (by omission or otherwise) if the words, read in context, could be reasonably understood by the average person to state a defamatory falsehood. *See Healey v. New England Newspapers, Inc.*, 555 A.2d 321, 326 (R.I. 1989), *pet. for cert. pending*, No. 88-1939; *Lyons*, 516 A.2d at 1343. The present decision in no way repudiates the holding of only two months earlier in *Healey* that true facts could give rise to an actionably false implication. Rather, because of the factual context, the court found no such implication in this particular case.

Petitioners cannot demonstrate that the decision below has "given birth to a startling and disquieting new First Amendment 'right,' " Petn. at 11, so they attempt to show

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[6] In attempting to give weight to the allegation that constitutional issues lurk beneath the surface of the opinion, petitioners raise several transparently insubstantial issues, all of which fail to transform the Rhode Island definition of "falsity" into a matter of constitutional concern. Petitioners discuss both the republication rule, Petn. at 11-12, and the fair report privilege, Petn. at 12-13, despite the fact that these concepts are, as petitioners admit, merely "common-law concepts of truth and privilege," Petn. at 13, were not argued by the parties in the Rhode Island Supreme Court, and are not even alluded to by the opinion. Additionally, petitioners discuss the relevant common-law issues of falsity by omission, Petn. at 15-18, and falsity by implication, citing a variety of cases which primarily apply state common law. Petn. at 18-19. The Rhode Island Supreme Court, however, has neither eliminated nor narrowed these doctrines, on a constitutional or other basis. *See infra*, Section II.

that similar cases have come to opposite conclusions. Petitioners' argument, however, demonstrates only that different facts may produce different results.

*Reilly v. Gillen*, 176 N.J. Super. 321, 423 A.2d 311 (App. Div. 1980), cited by petitioners, is, for example, easily distinguishable. The New Jersey court found "false" a reprint which reported a charge of conspiracy against a city council candidate because the complaint was later dropped. The *Reilly* reprint, however, was 23 years old and the decision gives no indication that it was plainly dated. It contained substantive errors unrelated to the acquittal and was distributed only three days before the election. By contrast, the three-year-old Jack Anderson reprint was clearly dated in several ways and was published well in advance of election day of a heated campaign. Petn. App. at A11. Every other "false accusation" case cited by petitioners, Petn. at 16-18, is distinguishable on more general grounds.[7]

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[7] Particularly, they all deal with a contemporary report of a stale accusation or conviction with the suggestion (often through the omission of the relevant date) that the information is the most current (and, hence, most accurate) available. By contrast, the dated reprint of an old news item in the present case is presented as the opposite of up-to-date news—it clearly implies that subsequent events may have occurred. Respondents have a variety of other disagreements with the way petitioners summarize the holdings of other state precedents. *Barasch v. Soho Weekly News*, 208 N.J. Super. 163, 505 A.2d 166, 175 (App. Div. 1986) did not find falsity, but merely remanded for further findings. Moreover, the New Jersey court indicated that the reporting of a stale criminal accusation could be privileged unless reported "in some completely unrelated matter . . . before the public . . . ." The decision in *DiLorenzo v. New York Times, Inc.*, 81 A.D.2d 844, 432 N.Y.S.2d 483 (N.Y. App. Div. 1980), does not indicate that there was ever any conviction, making the report of conviction false on its face even without the omission of later acquittal. In *Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau of Maricopa County, Inc.*, 130 Ariz. 523, 637 P.2d 733 (1981), the court made no explicit finding of falsity, and may have been inclined to assume that readers of a Better Business Bureau publication would expect more (or more contemporary) accuracy.

Nor is the decision below at odds with *Lyons v. Policemen's Association of the District of Columbia, Inc.*, Civil Action No. 74-441, slip op. (D.D.C. Feb. 20, 1976). This 1976 decision of the United States District Court for the District of Columbia involved a republication of only part of the Jack Anderson reprint under wholly different circumstances. Petitioners themselves note that the portions of the article containing Mr. Lyons' denials of the charges were omitted. Petn. at 15 n.9. In fact, seven full paragraphs were omitted. Additionally, the reprint at issue in the D.C. case (1) was not distributed as part of a labor election campaign, (2) contained a headline composed not by Jack Anderson but by the republishers ("IBPO PRESIDENT INVESTIGATED FOR MISUSE OF UNION FUNDS AND PERJURY"), and (3) contained additional text added by the republishers stating that they did not "know of the final outcome of the investigation," a statement which under the circumstances was plainly false.[8] Thus, the decision below does not conflict with the common law or with any prior application of law to the Jack Anderson reprint.

### III. There Is No Reason for This Court Again to Consider the Nature of the Independent Appellate Review Obligation in a Public Figure Libel Case.

Three months ago, the Court announced an opinion joined by eight Justices[9] in which it considered at length the manner in which a reviewing court in a public figure libel case must exercise its independent judgment to de-

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[8] Petitioners are additionally incorrect in asserting that the Rhode Island Supreme Court "reversed not only the verdict but its own prior ruling in this very case . . . ." Petn. at 3. The only ruling made by the court in *Lyons v. Rhode Island Public Employees Council 94*, 516 A.2d 1339 (R.I. 1986), was that plaintiffs' new trial motion should be granted because the motion could not properly be decided by a judge who did not sit through the trial and, therefore, could not assess the credibility of the witnesses.

[9] Mr. Justice Scalia filed an opinion concurring in the judgment.

termine whether the record establishes actual malice with the convincing clarity required by the *New York Times Co. v. Sullivan*[10] line of cases. *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S. Ct. 257, 105 L.Ed.2d 562 (1989). The present case was decided approximately a month prior to the *Harte-Hanks* decision but is perfectly consistent with it. Indeed, it is significant that apart from a casual and perfunctory assertion that the decision below "is directly at odds with" *Harte-Hanks*, Petn. at 22, petitioners neither address *Harte-Hanks* nor articulate just why the Court should so soon *again* consider the standards for appellate review of a public figure libel case.

There is simply no need for the Court to revisit these issues until the lower courts have had time to consider and apply the *Harte-Hanks* rules. In this case, the Rhode Island Supreme Court followed the mandate of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1983), in a manner which anticipated this Court's decision in *Harte-Hanks*:

> In finding whether "clear and convincing" evidence of "actual malice" exists, we must independently examine the whole record. *New York Times Co. v. Sullivan*, 376 U.S. at 285, 84 S. Ct. at 729, 11 L. Ed. 2d at 709. The usual "clearly erroneous" standard of appellate review is not applicable, so we must examine mixed findings of fact and law to determine the issue of actual malice.

Petn. App. at A9-A10. In fulfilling this duty, the court reviewed testimony from the employees of respondents who actually disseminated the Jack Anderson reprints. Petn. App. at A12-A13. More importantly, however, the court determined that, under relevant state law principles of construction, the publication could not have been made with actual malice because it was not "false." *See supra*,

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[10] 376 U.S. 254 (1964).

Section I. This independent review is entirely unremarkable and presents no reason for further review by this Court.

### IV. The Result Below Is Appropriately Protective of Vigorous and Heated Speech Uttered During a Hard Fought Labor Election Campaign.

As petitioners recognize, this case concerns a "literally accurate but incomplete" publication. Petn. at 13. The Jack Anderson reprint was circulated during a heated election contest between rival labor unions. This Court has frequently held that the First Amendment is particularly protective of political speech distributed during an election even when that speech is vituperative, exaggerated or hyperbolic. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Moreover, adversarial speech is given unusually wide tolerance in a labor union context:

> "It is a cliche by now but, nonetheless, an imbedded policy in labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, *nor do we prohibit*, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it to the employee to decide."

*Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974) (quoting Naumoff, *Ground Rules for Recognition Under Executive Order 11491*, 22 Lab. L.J. 100 (1970) (emphasis added)).[11]

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[11] Robust and provocative speech is typical of labor union campaigns: "Federal labor policy encourages robust, even abusive, speech during labor conflicts," *Hob Nob Hill Restaurant v. Hotel and Restaurant Employees Union*, 660 F. Supp. 1266, 1269 (S.D. Cal. 1987), "most exaggerations and misstatements are left to be countered or corrected in the give and take of a robust campaign," *Melrose-Wakefield Hospital Ass'n v. NLRB*, 615 F.2d 563, 567 (1st Cir. 1980).

These policies underlie the fact that the alternative to the Rhode Island Supreme Court's holding is untenable. Had the court allowed petitioners to collect millions in damages for dissemination of the Jack Anderson reprint on the ground that it was misleading, incomplete or contained a "half truth," it would have imposed absurd and sterile limitations on political campaigns and labor disputes. The Jack Anderson column reprinted in the campaign leaflets was accurately dated and contained a great deal of information that was indisputably accurate and relevant to voters in the union elections: that petitioner Lyons was vice-chairman of Democrats for Nixon, that he had numerous Nixon connections, and that he had testified before the Senate about his contacts with a company with underworld connections.

The court wisely recognized that it could not require political candidates to publicize facts which benefit their opponent, to redact their campaign material, or to give a "balanced" accounting of their opponents' record. In this case in particular, the reprint was circulated long before the relevant elections and petitioners had every opportunity not only to attack the reprint as incomplete, unfair or misleading, but also actually to supply any omitted or updating information as part of the give-and-take of a free election.[12]

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[12] The Rhode Island Supreme Court also recognized that the participants in a labor election campaign are aware of the biased nature of the candidates' charges and countercharges. Thus the court noted that one voter in the election testified that "[j]ust because someone says something does not mean its true." Petn App. at A12. This acknowledgment of the public's expectations of labor campaigns was yet another application of the traditional standard adopted by the court: "what the person . . . to whom the communication was published reasonably understood as the meaning intended to be expressed." *Lyons*, 516 A.2d at 1343 (quoting *Restatement (Second) of Torts* § 563(e) (1977)).

## CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

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No. 89-229

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*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island**

## PETITIONER'S REPLY MEMORANDUM

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1989

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No. 89-229

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KENNETH T. LYONS and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., [1]

Petitioners,

v.

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,

Respondents.

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On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

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PETITIONERS' REPLY MEMORANDUM

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1. Respondents' contention that the Rhode Island Supreme Court's holding on the decisive issue of falsity was based

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[1] Information concerning petitioner NAGE as required by Rule 28.1 is set forth in the Petition for Certiorari, at p.ii.

solely on state law is manifestly incorrect. In their briefs to the Rhode Island Supreme Court, respondents argued that proof of falsity in a libel action is constitutionally mandated, citing Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), cert. denied, 108 S.Ct. 200 (1987), and that the constitutional requirement of searching appellate review under Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), extends to the issue of falsity. Further, it is clear that the Rhode Island Supreme Court was convinced that the determination of falsity in this case was governed by constitutional principles, as is revealed by its explicit reliance on Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), as well as by the fact that the court's holding on the falsity issue is immediately preceded by a discussion of its review obligations under Bose, culminating in the observation that,

under Bose, the record must "independently support the assertion that the alleged defamatory material contains a false and defamatory statement of fact." Petn. App. A-10. Moreover, as even respondents acknowledge, the Rhode Island Supreme Court bolstered its finding that the Anderson reprint was not false by citations to this Court's First Amendment rulings in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971), and Mills v. Alabama, 384 U.S. 214 (1966). The Rhode Island Supreme Court's opinion thus makes clear that in holding that the Anderson reprints were, as a matter of law, not "false," the court perceived itself to be exercising a reviewing function required by the First Amendment and to be affording constitutional protection to respondents' speech. The correctness of the Rhode

Island court's holding thus presents a question of federal constitutional law.

That the Rhode Island court also cited opinions based on Rhode Island common law does not insulate its holding from review by this Court. "[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (emphasis added). The Rhode Island Supreme Court's primary reliance on Bose and Hepps as the basis for its review of the question of falsity renders the court's citation of state-court authority

insufficient to provide an adequate and independent state-law basis for its holding. At the very least, the Rhode Island court's ruling on falsity is "interwoven" with federal constitutional law, and thus may be reviewed by this Court.

2. Respondents' reliance on cases applying federal labor policy to libel actions, such as Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), is misplaced. Unlike the labor dispute in Austin, the labor election in which respondents libeled petitioners did not even implicate federal labor policy, as it involved state and local governmental employees not subject to the NLRA or to Executive Order 11491. In any event, Austin holds only that, where it is applicable, federal labor policy imposes on libel plaintiffs the standards of New York

Times Co. v. Sullivan, 376 U.S. 254 (1964), and that statements of opinion cannot serve as the basis for a libel verdict. 2/ Neither holding bars recovery by petitioners. Petitioners, who are public figures, have never contested the applicability of New York Times, nor have they attempted to win redress for any statements of opinion; rather, they seek recovery of damages resulting from respondents' knowingly false statements of fact concerning the government allegations and investigations of wrongdoing discussed in the Anderson reprints. Even where concerns for free speech are at their highest -- as in the case of press reporting of hotly contested political campaigns -- the First Amendment does not

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2/ The language respondents cite from Austin does not represent the Court's holding, but is merely a quotation from a government official concerning his views on regulation of labor campaigns.

bar imposition of liability for knowing false statements of fact. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989).

3. Respondents attempt to minimize the significance of the Rhode Island Supreme Court's ruling on the issue of falsity by suggesting that it amounts to little more than a factual finding. But the facts -- as found by the properly instructed jury -- were that respondents' statements would be reasonably understood by the average reader as stating a defamatory falsehood. The Rhode Island court's holding was that, as a matter of law, respondents' republication of Jack Anderson's account of false allegations of wrongdoing made in the course of terminated investigations could not be found false simply because the investigations were ongoing when the article was first written. As

demonstrated in the Petition for Certiorari, this holding is inconsistent with settled principles of libel law, [3] as well as with numerous decisions of other state and federal courts.

Respondents attempt to distinguish only two of those decisions, while ignoring or raising trivial objections to our characterizations of the rest. But even where respondents attempt to address directly the cases cited in the Petition, their efforts to identify genuine distinctions fall short. Respondents purport to distinguish Lyons v. Policemen's

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[3] Respondents contend that the discussion in the Petition of the doctrines of republication and privilege is "irrelevant" and that these issues were not raised below. The relevance of that discussion, as set forth in the Petition, is that the breadth of the lower court's misunderstanding of the meaning of falsity would render these settled doctrines useless and superfluous. The discussion thus bears directly on the correctness of the lower court's ruling on the issue of falsity, which was of course fully litigated and decided below.

Association of the District of Columbia, Civil Action No. 74-441 (D.D.C. Feb. 20, 1976), on the basis of the failure of the defendants in that case to reprint portions of the Anderson article that contained Mr. Lyons' denial of the charges. But this distinction is irrelevant, since the court below did not rely on the inclusion of this material in holding the article to be truthful: under the Rhode Island court's analysis, even the truncated version published in Policemen's Association would have remained "truthful." Respondents also suggest that Policemen's Association is distinguishable because the defendants in that case added to some of their reprints the false statement that they were unaware whether the investigations of Mr. Lyons were ongoing. But the District Court in the Policemen's Association case did not rely on this disclaimer in finding the

reprints false; rather, it explicitly held that other reprints distributed by the defendants without the disclaimer were equally or even more false, because they suggested by omission that the investigations definitely were ongoing. Finally, respondents' statement that the Policemen's Association reprint contained a headline not composed by Jack Anderson does not even amount to a factual distinction, since the same was true of respondents' "EXPOSE" reprint.

Simiarly unavailing is respondents' effort to distinguish Reilly v. Gillen, 176 N.J. Super. 321, 423 A.2d 311 (App. Div. 1980), on the ground that it is not clear that the 23-year-old article reprinted in that case was dated, as was the Anderson reprint distributed by respondents. But there is also no basis for concluding that the article republished in Reilly was not dated, and

the Reilly court's opinion nowhere suggests that its holding depended in any way on whether the article was dated or not. Nor did the court rely on the trivial factual errors in the article as the basis for holding that its republication was false once the charges it described had been dropped. Even more irrelevant is respondents' observation that the Reilly reprint was distributed on the eve of an election, whereas the Anderson reprint was not. While these facts might relate to the relative outrageousness of the misconduct of respondents and the Reilly defendants, they have no logical connection to the issue of whether the reprints distributed in each case were false.

The Rhode Island court's holding that the publication or republication of stale, incomplete and unfair accounts of terminated investigations into discredited

allegations is "truthful" as long as the allegations and investigations were in fact pending at some time in the past is inconsistent with the decisions in Reilly, Policemen's Association, and the other cases cited in the Petition: if the Rhode Island court is correct, these decisions are constitutionally defective. See also Lewisohn v. Dial Press, Inc., 264 A.D. 370, 35 N.Y.S.2d 551 (1942) (distribution of book libelous where post-publication events render account of judicial proceedings "no longer true"). The conflict between the Rhode Island court's ruling and the decisions of other courts that have recognized the falsity of efforts to resurrect and spread outdated charges renders review by certiorari appropriate in this case.

4. Finally, respondents suggest that there is no reason to review the Rhode Island court's application of Bose in

light of this Court's recent decision in Connaughton. Respondents understandably make little effort to defend the Rhode Island Supreme Court's de novo weighing of the evidence with respect to the factual issues of knowlege and falsity, as the court's procedure was plainly at odds with the deference commanded by Connaughton to the jury's inferences and its resolution of evidentiary contradictions. Instead, respondents argue simply that the Rhode Island court's error may be overlooked because the Court has so recently visited the issue of the scope of Bose review.

Were the Bose/Connaughton issue the only one raised by the case, respondents' argument might have some force. But the Rhode Island Supreme Court's misapplication of Bose was intertwined with and compounded the error in its ruling on the question of falsity, which is, as we have demonstrated, an issue of constitutional

import with respect to which the Rhode Island court's ruling has worked a significant distortion of libel principles and created a conflict with the decisions of other courts. Viewed in conjunction with the falsity question, the court's misapplication of Bose presents an additional reason for allowing the writ.

For the foregoing reasons, as well as those set forth in the Petition itself, the Petition for a Writ of Certiorari should be granted.

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